Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSE MARTIN AVELAR-CRUZ and GARY LAGUERRE,

Petitioners,

v.

JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service; BRIAN PERRYMAN, as Chicago District Director of the Immigration and Naturalization Service; and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LISA J. PALUMBO
DIANA C. WHITE
LEGAL SERVICES CENTER FOR IMMIGRANTS
LEGAL ASSISTANCE FOUNDATION OF CHICAGO
111 West Jackson Blvd., 3rd Floor
Chicago, IL 60604
(312) 341-1070

LUCAS GUTTENTAG
Counsel of Record
LEE GELERNT
JAYASHRI SRIKANTIAH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1663 Mission Street
San Francisco, CA 94103
(415) 621-2493

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Petitioners, longtime legal permanent residents of the United States, are barred from eligibility for relief from deportation based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA) enacted by Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA). Petitioners collectively challenged their final deportation orders on the grounds that Congress did not authorize application of Section 440(d) to pending deportation cases and that Section 440(d) violates the equal protection guarantee of the Fifth Amendment. Based on circuit precedents holding that direct review in the court of appeals by a petition for review had been repealed for aliens deportable on the basis of criminal convictions, petitioners brought their challenges in habeas corpus actions in federal district court. The Seventh Circuit, in contrast to the result now reached by six other circuits, held that the district courts did not have habeas corpus jurisdiction over either the statutory or the constitutional claim and accordingly dismissed petitioners' cases. Contrary to controlling circuit precedent, the court held that petitioners should have filed petitions for review but that the time for doing so had now expired; and contrary to subsequent circuit authority permitting review for aliens who filed habeas petitions based on pre-*LaGuerre* Seventh Circuit law, the court held that petitioners were now barred from obtaining review in any court, even of their constitutional claim. In *dicta*, the court stated that petitioners would have lost on the merits if review had been available.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether, in light of its own circuit precedent foreclosing review in the court of appeals by means of a petition for review, the lack of any reference to 28 U.S.C. 2241 in AEDPA and IIRIRA, and the requirements of the Constitution, the court of appeals erred in holding that petitioners were barred from challenging their deportation orders in habeas corpus proceedings under Section 2241.

2. Whether AEDPA Section 440(d) applies retroactively to immigration cases pending on the date of AEDPA's enactment.

3. Whether AEDPA Section 440(d) violates Equal Protection.

PARTIES TO THE PROCEEDINGS

Petitioners are Jose Martin Avelar-Cruz and Gary LaGuerre.

Respondents are Janet Reno, Attorney General of the United States; Doris Meissner, Commissioner of the Immigration and Naturalization Service; Brian Perryman, Chicago District Director of the Immigration and Naturalization Service; and the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI

Jose Martin Avelar-Cruz and Gary LaGuerre respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals (App. 1a-13a)[1] is reported at 164 F.3d 1035. The judgments and docket entries of the district court are reported at 6 F. Supp.2d 744 for petitioner Avelar-Cruz (App. 14a-47a) and appear at 1998 WL 100238 for petitioner LaGuerre (App. 71a-103a). An earlier opinion of the court of appeals relating to petitioner Avelar-Cruz (App. 62a-70a) is reported at 58 F.3d 338. The decisions and orders of the immigration judge (App. 50a-59a, 106a-112a) and the decisions of the Board of Immigration Appeals (App. 60a-61a, 104a-105a) for both petitioners are unreported.

JURISDICTION

The opinion of the court of appeals was issued on December 22, 1998, a petition for rehearing was denied on April 9, 1999, and the judgment of the court of appeals was filed on April 20, 1999. App. at 1a, 113a, 115a. On June 28, 1999, Justice Stevens extended the time within which to file a petition for a writ of *certiorari* to and including September 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "App." refers to the separately bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 117a-124a) are pertinent portions of the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2, the Due Process Clause, and Art. III, § 1 of the Constitution; 28 U.S.C. 2241; 8 U.S.C. 1105a(a) and 1182(c) (1994), as in effect before and after April 24, 1996; Sections 401(e), 440(a), and 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276, 1277; and Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625.

STATEMENT

This case concerns amendments to the Immigration and Nationality Act (INA) made in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The provisions at issue concern: (1) the jurisdiction of the federal courts; and (2) the relief available for longtime legal permanent residents deportable on the basis of their past criminal convictions. More specifically, the jurisdictional issue presented by this petition is whether the court of appeals erred in finding that habeas corpus jurisdiction under 28 U.S.C. 2241 has been repealed when neither AEDPA nor IIRIRA expressly repeals or even mentions Section 2241, when the elimination of habeas relief under Section 2241 raises complex constitutional questions regarding the scope of judicial review guaranteed by the Constitution (including, but not limited to, the Suspension Clause), and when the change in circuit precedent, announced without notice in this case, left the petitioners without any court in which to present even their constitutional claims. The issues on the

merits are whether a new restriction on statutory eligibility for relief from deportation applies retroactively, and whether the restriction violates equal protection by drawing an irrational distinction between deportable and excludable aliens.

Six other circuits have addressed the identical jurisdictional issue presented here and none has adopted the result or the reasoning of the Seventh Circuit. Five of those courts have also addressed the merits retroactivity issue presented here, and all five have held that the Attorney General erred in applying AEDPA 440(d) to all pending immigration cases. As a result, the federal courts are governed by contradictory jurisdictional rules and the Nation's immigration laws are subject to inconsistent application.

For the reasons stated below, the Court should grant *certiorari*, vacate the judgment of the court of appeals and remand for reconsideration in light of subsequent circuit and Supreme Court authority. Alternatively, the Court should grant plenary review of both the jurisdictional and the merits issues.

THE STATUTORY FRAMEWORK

1. *Relief from Deportation.* Aliens lawfully admitted for permanent residence who became subject to deportation because of a criminal conviction have long been statutorily authorized to apply for relief from deportation under former 8 U.S.C. 1182(c) if they met the eligibility criteria. Before 1996, those criteria were that the alien had a lawful unrelinquished domicile in this country for seven years, and, if his conviction was for an "aggravated felony" (as defined in the INA, 8 U.S.C. 1101(a)(43) (1994)), that he had not served a term of imprisonment for that conviction of five years or longer. 8 U.S.C. 1182(c)

(1995). The request for Section 1182(c) relief was adjudicated by an immigration judge as part of the deportation process and an order of deportation was not entered until the Section 1182(c) application was adjudicated. Over half of the total number of applications for Section 1182(c) relief were granted during fiscal years 1989 through 1994. *See Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1140 (1999).

On April 24, 1996, the President signed AEDPA into law. Section 440(d) provides that any alien who "is deportable by reason of having committed" one of a broad range of enumerated criminal offenses is ineligible for relief under 8 U.S.C. 1182(c), even if the alien has not served any time in prison. By its express terms, Section 440(d) applies only to deportable and not excludable aliens, and thus would not have applied to petitioners if they had travelled abroad and sought relief in exclusion proceedings when seeking to re-enter the country. The provision is silent, however, on whether it applies to immigration cases pending on the date of its enactment.

The Attorney General addressed the temporal scope of 440(d) when she issued a formal ruling (overruling the Board of Immigration Appeals) holding that AEDPA 440(d)'s new eligibility restrictions were applicable to all Section 1182(c) requests, regardless of when they were submitted or when the immigration proceeding commenced. *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997) (App. 125a). The Attorney General noted that Section 440(d) itself did not contain an express statement addressing the provision's temporal reach and concluded, on that basis alone, that Congress had not prescribed the cases to which Section 440(d) applies. The Attorney General's ruling pre-dated this Court's decisions in *Lindh v. Murphy*, 521 U.S. 320 (1997), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), and did

not consider whether congressional intent could be discerned from the statute's structure or its legislative history. Finding no evidence of congressional intent in the text of AEDPA 440(d), the Attorney General applied judicial default rules and held that application of the new restrictions to pending cases did not have "retroactive effect" under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

Five courts of appeals have now held that the Attorney General erred in *Matter of Soriano* in holding that AEDPA 440(d) applies to all Section 1182(c) cases pending when AEDPA became law. In each case, the circuits found that the specific language, structure and legislative history of AEDPA Title IV demonstrated congressional intent to apply Section 440(d) prospectively based on the "normal rules" of statutory construction, *Lindh*, 521 U.S. at 326, and that resort to judicial default rules was not warranted. Because these courts found that the statute did not apply retroactively, they had no occasion to address the equal protection challenge to AEDPA 440(d)'s differing treatment of deportable and excludable aliens. *See Shah v. Reno*, No. 98-2636, 1999 WL 493681, at *5 (8th Cir. July 1, 1999); *Mayers v. INS*, 175 F.3d 1289, 1301-04 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 239-42 (3d Cir.), *reh'g en banc denied*, ___ F.3d ___ (May 7, 1999); *Henderson v. INS*, 157 F.3d 106, 128-30 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, ___ U.S. ___, 119 S. Ct. 1141 (1999); *Goncalves*, 144 F.3d at 126-33.[2]

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[2] The Tenth Circuit found habeas jurisdiction to review a statutory retroactivity claim, but it did not address the precise merits question in this case, *i.e.*, whether Section 440(d) applies to immigration proceedings that were pending on AEDPA's effective date. It decided only that Section 440(d) does apply to pre-AEDPA *convictions*. *Jurado-Gutierrez v. Greene*, No. 97-1437, 1999 WL 637038, at *9 n.9 (10th Cir. Aug. 19, 1999). The Third

2. *Judicial Review.* Before AEDPA and IIRIRA, judicial review of final orders of deportation was governed by 8 U.S.C. 1105a. Under Section 1105a(a), review of final orders of deportation – regardless of the basis for the order – occurred by a petition for review directly in the courts of appeals. The statute further specified that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings," 8 U.S.C. 1105a(a)(10), but the courts of appeals disagreed about when an alien could invoke such habeas review. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290 (9th Cir. 1995); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986); *United States ex rel. Marcello v. INS*, 634 F.2d 964 (5th Cir. 1981).

a. The 1996 Amendments. AEDPA enacted two changes to 8 U.S.C. 1105a. First, in Subtitle A of Title IV, AEDPA 401(e) repealed the habeas provision in Section 1105a(a)(10). Second, in Subtitle B, AEDPA 440(a) amended Section 1105a(a)(10) to provide that no court shall review final orders of deportation entered against immigrants who are deportable based on enumerated criminal grounds.[3]

Circuit has now issued holdings on both pre-AEDPA proceedings and convictions, ruling in *Sandoval, supra*, that Section 440(d) does *not* apply to immigration proceedings commenced before AEDPA, but holding in *DeSousa v. Reno*, No. 99-1115, 1999 WL 643171 (3d Cir. Aug. 25, 1999), that Section 440(d) does apply to pre-AEDPA convictions when immigration proceedings commenced after AEDPA. Both the Third and Tenth Circuits rejected an equal protection challenge to Section 440(d). *DeSousa*, 1999 WL 643171, at *5-*8; *Jurado-Gutierrez*, 1999 WL 637038, at *14-*15.

[3] Section 440(a) provides: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by [enumerated grounds of deportation] shall not be subject to review by any court." AEDPA 440(a), 110 Stat. 1276.

IIRIRA became law four months later and enacted more comprehensive changes to judicial review. First, it enacted special "transitional" rules amending Section 1105a. The transitional rules govern judicial review of deportation cases – such as those of these petitioners – where immigration proceedings commenced *before* April 1, 1997, and the BIA's final order of deportation issued *after* October 30, 1996. *See* IIRIRA 309(a), (c)(1) & (4); *Reno v. American-Arab Anti-Discrimination Committee*, ___ U.S. ___, 119 S. Ct. 936 (1999).[4] Section 309(c)(4)(G) of the transitional rules provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]." IIRIRA 309(c)(4)(G), 110 Stat. 3009-626. These uncodified transitional judicial review rules apply notwithstanding any provision of Section 1105a to the contrary. IIRIRA 309(c), 110 Stat. 3009-625. Second, IIRIRA repealed Section 1105a altogether and enacted a new permanent judicial review statute for immigration cases initiated on or after April 1, 1997 (now called "removal" proceedings). This provision, codified at 8 U.S.C. 1252, applies only to "removal" cases, and has no application to this case. *See* 8 U.S.C. 1252 (Supp. II 1996).[5]

None of the various amendments to the judicial review statutes enacted by AEDPA or IIRIRA expressly

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[4] For cases with a final BIA order issued *before* October 31, 1996, the transitional rules do *not* apply and only Section 1105a (as amended by AEDPA) governs judicial review. IIRIRA 309(c)(2).

[5] One provision of Section 1252, subsection (g), applies to pre-April 1, 1997 cases but only to a narrow subset of claims that are not raised here, as petitioners seek review only of a final order of deportation. *American-Arab Anti-Discrimination Committee*, 119 S. Ct. at 943.

amend or address the general grant of habeas corpus jurisdiction to the federal courts under 28 U.S.C. 2241. AEDPA and IIRIRA's transitional (and permanent) rules make no mention of Section 2241 at all.

b. Application of AEDPA and IIRIRA's Transitional Rules by the Courts of Appeals. The effect of the new statutes on the federal courts' jurisdiction to review final deportation orders first arose in the context of petitions for review filed in the courts of appeals. Over the objection of immigrants seeking to preserve court of appeals' jurisdiction over petitions for review, the circuit courts, including the Seventh Circuit, overwhelmingly held that AEDPA 440(a) and IIRIRA transitional rule 309(c)(4)(G) repealed the circuit courts' jurisdiction over petitions for review filed by immigrants deportable on criminal grounds seeking to challenge the denial of relief from deportation. In each of these decisions, however, the circuit courts dismissed the petitions for review without foreclosing, and in many cases expressly assuming, the availability of habeas review.[6] The courts of appeals declined to decide whether habeas corpus was definitively available (or to address the scope of review that habeas might provide) until the alien had filed a district court habeas corpus action. Some immigrants unsuccessfully sought *certiorari* in this Court of those rulings on the ground that the Constitution,

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[6] *See Turkhan v. INS*, 123 F.3d 487, 489-90 (7th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997). *See also Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir.), *reh'g en banc denied*, 159 F.3d 1358 (1998); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1155 (10th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 354 n.1 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Hincapie-Nieto v. INS*, 92 F.3d 27, 30-31 (2d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n.4 (9th Cir. 1996).

including the Suspension Clause, required preservation of judicial review. The Solicitor General opposed *certiorari* on the basis, *inter alia*, that any claim under the Constitution's Suspension Clause must await the filing of a habeas corpus petition.[7]

In the face of these uniform circuit court decisions, immigrants (like the petitioners here) filed habeas corpus actions to obtain judicial review of their final orders of deportation. Seven courts of appeals have now squarely ruled on the availability of habeas corpus in cases governed by AEDPA 440(a) or IIRIRA 309(c)(4)(G) to challenge AEDPA 440(d) on statutory retroactivity and constitutional equal protection grounds. Contrary to the ruling in this case, the other six circuits have held that AEDPA and IIRIRA's transitional rules do not repeal the district courts' habeas corpus jurisdiction under 28 U.S.C. 2241, and that the scope of such review includes both the constitutional and statutory claims. Those courts concluded that the repeal of Section 2241 must be express, that the applicable provisions of AEDPA and IIRIRA do not mention Section 2241, and that preserving the district courts' habeas corpus jurisdiction avoids difficult and complex constitutional questions that would otherwise be raised by the bar on court of appeals review of deportation orders. *See Jurado-Gutierrez*, 1999 WL 637038, at *4-*8;

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[7] Brief for the Respondent [INS] in Opposition at 23, *Katsoulis v. INS*, No. 97-379 (filed Nov. 1997), *cert. denied*, ___U.S.___, 118 S. Ct. 624 (1997) (opposing *certiorari* and arguing that any claim under Suspension Clause was not properly presented because petitioner "did not seek a writ of habeas corpus"); Brief for the [INS] in Opposition at 15, *Chamorro-Torres v. INS*, No. 96-985 (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (1997) (same); Brief for the [INS] in Opposition at 9, *Qasguargis v. INS*, No. 96-806 (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (1997) (same).

Shah, 1999 WL 493681, at *1-*4; *Mayers*, 175 F.3d at 1295-1301; *Sandoval*, 116 F.3d at 229-38; *Henderson*, 157 F.3d at 118-22; *Goncalves*, 114 F.3d at 116-26.

c. The Government's Prior Certiorari Petitions. Last Term, the Solicitor General petitioned for *certiorari* on both the jurisdictional and statutory retroactivity question in three cases and presented the Court with the split in circuit authority precipitated by the decision in this case (in which a petition for rehearing then remained pending). The Court denied *certiorari* in two cases, and remanded the other in light of *American-Arab Anti-Discrimination Committee*. *See Reno v. Goncalves*, 119 S. Ct. 1140 (1999); *Reno v. Navas*, 119 S. Ct. 1141 (1999); *INS v. Magana-Pizano*, 119 S. Ct. 1137 (1999).[8] Since then, and subsequent to the opinion in this case, the Third, Eighth, Tenth and Eleventh Circuits have agreed with the majority approach and have held that Section 2241 remains available to review final deportation orders for both constitutional and statutory error. *See Jurado-Gutierrez*, 1999 WL 637038, at *8; *Shah*, 1999 WL 493681, at *4; *Mayers*, 175 F.3d at 1301; *Sandoval*, 116 F.3d at 238.

d. Seventh Circuit Precedent. The Seventh Circuit has had four sets of (conflicting) precedent. First, in *Yang v. INS*, 109 F.3d 1185 (7th Cir.), *cert. denied sub nom. Katsoulis v. INS*, ___ U.S. ___, 118 S. Ct. 624 (1997), the court stated in *dicta* that habeas review would be abolished when IIRIRA took effect, and that insofar as any review was available to challenge the denial of relief from deportation, that review must be sought in the court of appeals

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[8] In *Magana-Pizano*, the Ninth Circuit ruled, based on now-vacated circuit precedent, that Section 1252(g) had repealed 28 U.S.C. 2241 for cases governed by IIRIRA's transitional rules and that such repeal was unconstitutional. *American-Arab's* narrow reading of Section 1252(g) requires the Ninth Circuit to reconsider whether its constitutional ruling was necessary.

by means of a petition for review.[9] Second, contrary to *Yang*, the court then unequivocally held, in *Chow v. INS*, 113 F.3d 659 (7th Cir. 1997), and *Turkhan v. INS*, 123 F.3d 487 (7th Cir. 1997) ("*Turkhan I*"), that there was no review available in the court of appeals to challenge the denial of relief from deportation – even on constitutional grounds – and that aliens seeking such review could not bring petitions for review. However, both *Chow* and *Turkhan I* expressly stated that habeas review might still be available. Third, in this case the Seventh Circuit held that habeas review was *not* available and, contrary to *Chow* and *Turkhan I*, that a petition for review *could* still be filed in the court of appeals to challenge the denial of relief from deportation (at least to raise constitutional claims, and possibly also to bring a statutory retroactivity challenge). Finally, the Seventh Circuit has recently issued two subsequent opinions stating that the decision in this case changed circuit precedent and that aliens who followed *Chow* and *Turkhan I* by filing habeas corpus actions instead of filing petitions for review "could not have known" that they were filing in the wrong court. *Singh v. Reno*, No. 98-3584, 1999 WL 335675, at *5 (7th Cir. May 26, 1999); *Turkhan v Perryman*, No. 98-1964, 1999 WL 615531, at *6 (7th Cir. Aug. 16, 1999) ("*Turkan II*"). In both of those cases the court found that the alien was entitled to obtain judicial review, either by habeas corpus in the district court (*Turkhan II*) or by direct review in the court of appeals (*Singh*), because immigrants should not be penalized for following then-controlling precedent.

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[9] *Yang* also held that Section 440(a) allowed the courts of appeals to determine the existence of the three statutory conditions – alienage, deportability, and conviction of a disqualifying offense – on which the denial of review depends. *Yang*, 109 F.3d at 1192, 1196.

STATEMENT OF FACTS

1. Administrative and District Court Proceedings.

Avelar-Cruz. Jose Martin Avelar-Cruz came to the United States as a child and has been a permanent resident since 1989. In 1993 the INS commenced deportation proceedings against him based on a criminal conviction. In 1994, he applied for a waiver of deportation under Section 1182(c), but the Immigration Judge (IJ) and BIA ruled that he was not statutorily eligible for relief under the pre-AEDPA criteria. The Seventh Circuit reversed and remanded to the BIA in June 1995, holding that Avelar-Cruz was statutorily eligible. *Avelar-Cruz v. INS*, 58 F.3d 338 (7th Cir. 1995) (App. 62a). More than seven months later, in February 1996, the BIA remanded to the IJ for a hearing on the Section 1182(c) application. Nine months after the BIA's remand order, the IJ conducted a hearing. By that time AEDPA had been enacted and the IJ ruled that Section 440(d) now rendered Avelar-Cruz ineligible for Section 1182(c). On January 8, 1998, the BIA affirmed based on the Attorney General's ruling in *Matter of Soriano* holding that Section 440(d) applies retroactively.

When the BIA issued the final deportation order, the Seventh Circuit had already held in *Chow* and *Turkhan I* that the court of appeals' petition-for-review jurisdiction had been repealed. Accordingly, Avelar-Cruz sought review by habeas corpus to challenge AEDPA 440(d) on statutory retroactivity and constitutional equal protection grounds. The district court exercised jurisdiction over both claims, rejected the statutory claim, and ruled for Avelar-Cruz on the constitutional equal protection claim.

LaGuerre. Gary LaGuerre also came to the United States as a child and has been a permanent resident since 1985. In December 1995, the INS commenced deportation proceedings against him based on a criminal conviction. LaGuerre's immigration hearing occurred in October

1996, by which time AEDPA had become law. LaGuerre sought to apply for a waiver of deportation under Section 1182(c), but the IJ ruled that he had been rendered ineligible by AEDPA 440(d). The BIA affirmed based on *Matter of Soriano*. The BIA's final order of deportation was issued on August 1, 1997. In light of the Seventh Circuit's rulings in *Chow* and *Turkhan I*, LaGuerre filed a habeas corpus action in district court raising a statutory retroactivity challenge to the Attorney General's *Soriano* ruling. The district court exercised jurisdiction but denied the petition on the merits.

2. The Court of Appeals Opinion.

a. The court of appeals consolidated the two habeas appeals. App. 1a. It held that AEDPA 440(a) deprived the district courts of habeas corpus jurisdiction under 28 U.S.C. 2241, but suggested that immigrants could continue to bring some claims in the court of appeals by a petition for review. The court denied all review to these petitioners, however, stating that they had "brought their actions in the wrong court under the wrong statute" and it was "now too late for them to file a petition for review in the right court . . . " App. 10a. The court did not reconcile its ruling with the circuit's prior holdings in *Chow* and *Turkhan I* (*i.e.*, that the court of appeals could not entertain petitions for review challenging the denial of a waiver – even on constitutional grounds), nor did the opinion address the fact that *Chow* and *Turkhan I* were the controlling precedent at the time these petitioners sought judicial review.

The court did not find that AEDPA had expressly amended or repealed the general federal habeas corpus statute, 28 U.S.C. 2241, and noted the "omission from section 440(a) of an explicit reference to 28 U.S.C. § 2241." App. 6a. The court nonetheless held that access to Section

2241 had been repealed based on its view that the "purpose" of the amendments was inconsistent with the availability of district court habeas corpus review. App. 6a. The court did not address whether AEDPA, IIRIRA, or the general intent the court attributed to Congress were sufficient to satisfy the rule of *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), and *Felker v. Turpin*, 518 U.S. 651 (1996), that repeal of Section 2241 must be express and cannot be implied.[10]

The court of appeals rejected any concern that the Suspension Clause might entitle petitioners to review of their claims. The opinion states that the Suspension Clause ensures review only when the "jurisdiction" of the detaining authority was at issue. App. 5a. Applying that standard, the court of appeals concluded that the Suspension Clause did not encompass petitioners' claims because it believed there was no question about the "jurisdiction" of the detaining authorities, as petitioners were seeking to litigate "whether they are entitled to ask for discretionary relief" from deportation. App. 5a. The court of appeals did not address petitioners' additional contention that the right to judicial review over their statutory and constitutional claims was also guaranteed by due process and Article III's separation of powers principle.

The court suggested that the statute did not necessarily extinguish all judicial review and assumed that the court of appeals could hear some constitutional claims in a petition for review, App. 8a (citing *Webster v. Doe*, 486

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[10] The court's holding that Section 2241 was repealed is based solely on AEDPA 440(a) and does not consider or address the transitional judicial review provision, IIRIRA 309(c)(4)(G), that specifically governs the judicial review of these final orders because they were issued after October 30, 1996. *See supra* at 7.

U.S. 592 (1988)) and "maybe" even a statutory retroactivity claim. App. 12a.[11] The opinion did not explain how the plain text of Section 440(a) would be construed to permit review in the court of appeals of non-constitutional claims. In any event, the court held that these petitioners could not take advantage of whatever review remained in the courts of appeals because they had not filed petitions for review and it was now too late for them to do so. App. 10a.

Finally, the court crafted an additional exception on the door-closing effect of Section 440(a) by indicating that "if for reasons beyond the alien's control he could not have raised his substantial constitutional claims in this court by seeking review here directly under section 440(a), he may be able to proceed in the district court under 28 U.S.C. § 2241." App. 10a. The opinion does not explain why this exception does not apply to the petitioners themselves. *Compare Turkhan II*, 1999 WL 615531, at *6-*7.

b. The opinion also expresses a view on the merits of petitioners' statutory and constitutional claims. It states that AEDPA's provisions, taken together, make it "impossible for us to determine whether as a matter of legislative intent . . . [Section 440(d)] is to be applied prospectively or retroactively." App. 10a-11a. The court then concluded that while a statute governing "primary

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[11] The opinion suggested that the Third, Tenth and Eleventh Circuits might follow its approach in light of preliminary rulings by those circuits. App. 8a-9a. All three circuits, however, have subsequently issued holdings upholding district court habeas corpus under Section 2241 over the identical claims presented in this case. *See Jurado-Gutierrez*, 1999 WL 637038, at *4-*8; *Mayers*, 175 F.3d at 1295-1301; *Sandoval*, 166 F.3d at 229-38.

(out of court) duties" or "disturb[ing] reasonable expectations" is presumed not to apply retroactively, App. 11a, Section 440(d) applies to all cases because immigrants do not base any actions on whether they will be eligible for a waiver of deportation. App. 11a-12a. The court also rejected the equal protection challenge to Section 440(d) on the ground that Section 440(d) creates an incentive for deportable aliens to leave the country voluntarily to take advantage of the opportunity to seek a Section 1182(c) waiver in exclusion proceedings. App. 12a.

c. The Seventh Circuit denied rehearing *en banc* over the dissent of Judges Ripple, Rovner, and D. Wood. App. 113a-114a.

REASONS FOR GRANTING THE PETITION

The court of appeals ruled that AEDPA repealed all habeas corpus jurisdiction over petitioners' deportation orders, and held that whatever limited judicial review remains for immigrants deportable on criminal grounds lies exclusively in the court of appeals by means of a petition for review. App. 8a-9a. That result has been rejected by every other circuit to consider the issue.

Six other circuits have now ruled on the precise jurisdictional issue in this case (the First, Second, Third, Eighth, Tenth, and Eleventh), and *all six* have held that the amendments made by AEDPA and IIRIRA's transitional rules do not repeal habeas jurisdiction but, instead, limit the jurisdiction of the courts of appeals to adjudicate petitions for review – the exact opposite conclusion reached by the Seventh Circuit. *Jurado-Gutierrez*, 1999 WL 637038, at *4-*8; *Shah*, 1999 WL 493681, at *1-*4; *Mayers*, 175 F.3d at 1295-1301; *Sandoval*, 116 F.3d at 229-38; *Henderson*, 157 F.3d at 118-22; *Goncalves*, 144 F.3d at 116-26. *Cf. Lerma de Garcia*, 141 F.3d at 217 (dismissing petition for review but finding that habeas remains available without

addressing scope of review); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997) (same); *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 1139 (1999) (dismissing § 1331 district court action challenging deportation, but finding that habeas review remained available).[12]

Likewise, the court of appeals' ruling on the temporal scope of AEDPA 440(d) is contrary to the holdings of five other circuits. *See Shah*, 1999 WL 493681, at *5; *Mayers*, 175 F.3d at 1304; *Sandoval*, 166 F.3d at 242; *Henderson*, 157 F.3d at 129-30; *Goncalves*, 144 F.3d at 133. Only in the Seventh Circuit are longtime, legal permanent residents disqualified from eligibility for relief from deportation under Section 1182(c) and subject to automatic deportation, even if they were put into immigration proceedings long before that provision was enacted. This stark lack of uniformity has already caused, in Chicago alone, many immigrants to be deported and many more to face imminent deportation.[13]

For the reasons discussed more fully below, the conflict created by the Seventh Circuit – on nationally-applicable questions affecting the lives of thousands of longtime lawful residents – warrants this Court's plenary

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[12] All six circuits have also uniformly rejected the argument that only constitutional claims are reviewable and have instead held that the statutory retroactivity challenge raised by the petitioners in this case is also reviewable under Section 2241. *See Jurado-Gutierrez*, 1999 WL 637038, at *6-*8; *Shah*, 1999 WL 493681, at *2-*4; *Mayers*, 175 F.3d at 1300-01; *Sandoval*, 166 F.3d at 231-38; *Henderson*, 157 F.3d at 120-22; *Goncalves*, 144 F.3d at 123-25.

[13] Petitioners acknowledge that the opinion's comments on the merits constitute *dicta* in this case, but the Seventh Circuit has subsequently relied on the discussion to resolve the issue for the Seventh Circuit. *See Singh*, 1999 WL 335675, at *4. *See also Turkhan II*, 1999 WL 615531, at *12.

review. The Seventh Circuit's ruling subjects immigrants to divergent jurisdictional rules and inconsistent interpretations of the immigration laws depending on the state in which they reside.

However, because of subsequent significant developments in the Seventh Circuit and the particular circumstances of this case, plenary review is not necessary. Petitioners respectfully submit that the proper disposition is a remand to the court of appeals for further consideration of the jurisdictional question in light of the Seventh Circuit's subsequently issued and conflicting jurisdictional rulings, and for further consideration of the retroactivity issue in light of this Court's decision in *Martin v. Hadix*, ___ U.S. ___, 119 S. Ct. 1998 (1999). Alternatively, the Court should grant plenary review on both jurisdiction and the merits.

I. The Court Should Grant the Writ, Vacate the Judgment, and Remand to the Court of Appeals in Light of Conflicts Within the Seventh Circuit Regarding the Jurisdiction of the Federal Courts.

The court of appeals broadly held that the proper forum in which to seek judicial review in cases governed by AEDPA 440(a) is the court of appeals and not the district court in a habeas action. However, this case can and should be resolved on narrow grounds. The opinion held that the petitioners had sought review "in the wrong court," *see* App. 10a, even though they complied with the clear holdings and the explicit directions of the Seventh Circuit's then-controlling law. Those decisions, *Chow* and *Turkhan I*, were issued before these petitioners received their final orders of deportation and specifically held that petitions for review were barred, instructing immigrants to seek review by other means, including habeas corpus. Petitioners followed the route prescribed by the Seventh

Circuit, only to be told that they should have chosen the route that the court had previously foreclosed.

Regardless of whether a circuit court writing on a clean slate might properly find that review belongs in the court of appeals in light of AEDPA 440(a), the court of appeals may not first announce that jurisdiction over petitions for review has been repealed and then, after the thirty-day filing deadline for petitions for review has elapsed, reverse its decision and hold that petitioners who failed to file timely petitions for review have irretrievably forfeited their right to judicial review altogether. Yet that is precisely what occurred here, thereby precluding review even of petitioners' constitutional claims.

Chow and *Turkhan I* unmistakably held that the 1996 amendments eliminated any jurisdiction in the *courts of appeals* over petitions for review brought by aliens deportable on criminal grounds challenging denial of relief from deportation. *See Turkhan I*, 123 F.3d at 490; *Chow*, 113 F.3d at 669-70. The Seventh Circuit dismissed petitions for review in both cases even though the petitioners raised constitutional challenges to their deportation orders and Turkhan specifically argued that jurisdiction over constitutional claims was not repealed. *Turkhan I*, 123 F.3d at 490 (*Chow* "decisively refutes Turkhan's contention that § 440(a) must still permit constitutional challenges brought [in the court of appeals]"); *id.* ("[i]n [*Chow*] we declined to read an exception for constitutional claims into the language of § 440(a) of the AEDPA."). At the same time, *Chow* and *Turkhan I* expressly left open other possibilities for judicial review, including habeas corpus actions. *Id.* at 490 ("*Chow* . . . makes clear that even if review pursuant to INA § 106(a) is foreclosed, other avenues for review remain open") (quotations and citations omitted); *Chow*, 113 F.3d

at 669-70. The critical point is that both cases unmistakably stated that, wherever review may lie, it could not be sought in the court of appeals. Accordingly, there was no reason and no basis for these petitioners to file petitions for review when they sought judicial review.

In two decisions issued after rehearing was denied in this case, the Seventh Circuit held that immigrants will not be barred from obtaining judicial review because they failed to file a petition for review under pre-*LaGuerre* circuit law. In *Singh*, the immigrant, like the petitioners here, did not file a petition for review but instead sought review by means of a district court habeas action. *Singh*, 1999 WL 335675, at *1. The Seventh Circuit remanded the case to the Immigration Judge for further administrative proceedings on the basis of the due process claim. In doing so, the Court held that, in light of *LaGuerre*, there was no habeas jurisdiction available and dismissed the district court action. *Id.* at *2. But, noting that aliens should not be penalized for relying on then-controlling circuit precedent, the Court held that "because Singh could not have known that he was in the wrong court – our case law pre-*LaGuerre* would have directed him to the district court rather than to this Court – we believe he is entitled to another chance to argue his case." *Id.* On this basis, the Court rejected the government's contention that Singh had forfeited his right to judicial review and permitted him to obtain direct review in the court of appeals.

Likewise, in *Turkhan II* (an appeal of a habeas action filed after the court of appeals dismissed the alien's petition for review in *Turkhan I*), the Seventh Circuit permitted the alien to obtain habeas review, notwithstanding *LaGuerre*. As in *Singh*, the Seventh Circuit acknowledged that it had previously held in *Chow* and *Turkhan I* that AEDPA and IIRIRA's transitional rules divested the courts of appeals of jurisdiction to adjudicate petitions

for review filed by aliens with criminal convictions: "[b]ased on the law of this Circuit [in *Chow*] at the time we reviewed [Turkhan's] consolidated appeal, we concluded that we did not have jurisdiction to hear his claims pursuant to AEDPA § 440(a) or IIRIRA § 309(c)." *Turkham II*, 1999 WL 615531, at *7. The Court then quoted *Singh* with approval for the proposition that an alien "could not have known that he was in the wrong court" and that "he [was] entitled to another chance to argue his case." *Id.*[14]

Petitioners respectfully submit that the judgment should be vacated and remanded to the Seventh Circuit to reconcile the decision below with the subsequent and conflicting circuit rulings. First, in an effort to eliminate the inter-circuit conflict, the court of appeals should reconcile the decision in this case with the decisions from the other courts of appeals on the broad question whether aliens with criminal convictions should seek review in the court of appeals or district court. But, regardless of the Seventh Circuit's reconsideration of the broad jurisdictional question, a remand is necessary to allow the court of appeals to reconcile the dismissal of these petitioners' habeas petitions with its subsequent rulings in *Singh* and *Turkhan II*. In both cases, the Seventh Circuit candidly acknowledged the unfairness of withdrawing judicial review over cases, like petitioners, where the alien "could not have known that [they] were headed for the wrong

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[14] The fact that the alien in *Turkhan II* had filed a petition for review which the Seventh Circuit dismissed is irrelevant. If the court of appeals were to place any significance on that factor, it would be tantamount to denying any controlling force to opinions beyond the actual case in which they are issued. Here, petitioners were identically situated to the aliens in *Chow* and *Turkhan I*, and correctly read those rulings as foreclosing their right to file petitions for review.

court" and held that the alien should not "be prejudiced for failing to seek review in this Court [of Appeals] within the statutory 30-day deadline" given the "case law of this circuit" at the time. *Singh*, 1999 WL 335675, at *5.

II. In the Alternative, the Court Should Grant Plenary Review to Resolve the Circuit Conflict Over the Proper Jurisdiction of the Federal Courts.

1. If the Court does not vacate the judgment and remand to the court of appeals, then plenary review is warranted. The Seventh Circuit's ruling is in conflict with the result uniformly adopted by six other circuits and concerns a nationally-applicable question of jurisdiction affecting the operation of the federal courts and the predictability of rules governing judicial review of final deportation orders.

2. The Seventh Circuit's analysis also raises far-reaching constitutional questions concerning the limits on Congress's power to regulate the jurisdiction of the federal courts. As the other circuits have recognized, if the 1996 amendments are construed to preserve Section 2241 jurisdiction over deportation orders, it is unnecessary to decide whether the scope of review guaranteed directly by the Constitution encompasses statutory claims because Section 2241's plain terms set forth its scope of review. 28 U.S.C. 2241(c)(3) (violations of the "Constitution or laws or treaties of the United States"). *See, e.g., Jurado-Gutierrez*, 1999 WL 637038, at *8; *Shah*, 1999 WL 493681, at *3; *Sandoval*, 166 F.3d at 237; *Goncalves*, 144 F.3d at 122. *See also Felker*, 518 U.S. at 661-62 (resolution of Article III questions unnecessary because of availability of § 2241).

The Seventh Circuit appeared to suggest that its approach might also avoid constitutional adjudication by exempting constitutional claims from the bar on review in

the court of appeals and suggesting that "maybe" statutory retroactivity claims could also be exempted because it "seem[ed] unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." App. 12a. However, under the Seventh Circuit's analysis, other types of statutory claims would appear to be barred. Consequently, the court's approach will compel it to address far-reaching questions regarding the constitutional right to review of statutory challenges to deportation orders, such as, for example, the statutory violation the Seventh Circuit found in Avelar-Cruz's first appeal to the circuit. *See Avelar-Cruz v. INS*, 58 F.3d 338 (7th Cir. 1995) (finding that BIA misinterpreted seven-year requirement in 8 U.S.C. Section 1182(c)) (App. 62a). *See also Kolster v. INS*, 101 F.3d 785, 787 (1st Cir. 1996) (raising claim regarding seven-year eligibility requirement).

3. Finally, the court of appeal's Suspension Clause analysis is incorrect, cannot be squared with this Court's decisions, and has been rejected by the other circuits. The court of appeals stated that the Suspension Clause did not encompass petitioners' claims and that the scope of review guaranteed by the Suspension Clause does not move in "lockstep" with Congress' statutory enlargements of habeas review. App. 6a. Yet, petitioners' argument is not that their claims are encompassed by the Suspension Clause because of statutory enlargements made over the years, but rather, that the Suspension Clause has historically covered the types of claims raised in this case. The opinion's reference to the potential for an "irrational ratchet" is thus based on the mistaken assumption that petitioners are seeking review in excess of what the Suspension Clause has historically protected. App. 5a.

The court of appeals' conclusion that the Suspension Clause, as originally understood, would not cover petitioners' claims is based on the failure to distinguish between the Suspension Clause's use in post-conviction criminal cases (where there has been prior review by another court), and the Suspension Clause's use in cases where, as here, the petitioner challenges *executive* detention (where there has been no prior review by a judicial tribunal). The other circuits to address this issue have rejected the use of habeas cases in the criminal context as the proper measure of the scope of review guaranteed by the Suspension Clause in immigration cases. *See, e.g., Mayers*, 175 F.3d at 1296 n.7; *Henderson*, 157 F.3d at 120; *Goncalves*, 144 F.3d at 118 n.8. *See generally Shah*, 1999 WL 493681, at *3-*4. The other circuits recognized that the historic purpose of the Suspension Clause was precisely to challenge executive detention "without judicial trial," *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[t]he traditional Great Writ was largely a remedy against executive detention."). This Court has specifically cautioned against conflating habeas cases in the criminal context with cases where there has been no prior judicial review, specifically citing immigration cases as an example. *See, e.g., Sunal v. Large*, 332 U.S. 174, 177 & n.3 (1947) (a direct appeal "could have been taken" and "[w]e therefore lay to one side [immigration] cases such as *Bridges v. Wixon*, 326 U.S. 135 [(1945)] . . . where the order of the agency . . . was not subject to judicial review.").

The voluminous and specific body of habeas law in the immigration context shows that the scope of constitutionally mandated habeas review for immigrants has never been limited in the restrictive manner suggested by the court of appeals. This Court and the lower courts

have traditionally exercised habeas jurisdiction to ensure that both the initial finding of deportability and the denial of discretionary relief complied with the Constitution and the governing immigration statutes. This habeas review occurred even under the 1891 and 1917 Immigration Acts, where the only "judicial intervention" permitted was that "required by the Constitution," and was, by definition, constitutionally mandated. *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953). *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *Mahler v. Eby*, 264 U.S. 32, 44-45 (1924). *See Henderson*, 157 F.3d at 120 ("for at least one hundred years the courts have reviewed the executive branch's interpretation of the immigration laws, and have deemed such review to be constitutionally mandated"). *See also Mayers*, 175 F.3d at 1299-1300; *Sandoval*, 166 F.3d at 237.[15]

The Seventh Circuit did not cite any immigration habeas decisions, or even any decision involving executive detention, but nonetheless held that petitioners' claims were not encompassed within the scope of review over deportation orders guaranteed by the Suspension Clause. The potentially far-reaching implications of the court's constitutional analysis and the divergence of its holding from six other circuits warrants plenary review.

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[15] In *Accardi* the Court reviewed in habeas corpus the "refusal to exercise" discretion over the dissenters' objection that habeas review did not extend to the denial of discretionary relief. *See Accardi*, 347 U.S. at 269 (Jackson, J., dissenting).

III. On the Merits, the Court Should Grant the Writ, Vacate the Judgment and Remand to the Court of Appeals for Further Consideration in Light of *Martin v. Hadix*, or, in the Alternative, Grant Plenary Review to Resolve the Circuit Conflict Over Whether Section 440(d) Applies Retroactively.

A. The Ruling on Retroactivity Should be Vacated and Remanded.

After the court of appeals' decision, this Court decided *Martin v. Hadix*, ___ U.S. ___, 119 S. Ct. 1998 (1999), which once again emphasized the need to analyze a new statute closely to discern its temporal reach and the need to make a "common sense, functional judgment" of the statute's actual effect, based on "familiar considerations of fair notice, reasonable reliance, and settled expectations" when Congress' intent is not discernible. *Martin*, 119 S. Ct. at 2006. *Martin* is the fourth Supreme Court decision in recent years to address and reject sweeping claims that new legislation should be interpreted retroactively. *See Lindh v. Murphy*, 521 U.S. 320 (1997); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

That "common sense, functional judgment" in *Martin* recognized that lawyers who had undertaken monitoring work in two complex class actions had a reasonable expectation that they would be compensated at prevailing market rates, as provided in court orders. When Congress enacted legislation capping the rates for such work, without specifying when the legislation should take effect, the Court applied the statute only to work done after its effective date. "To give effect to the [statute's] fee limitations, after the fact, would attach new legal consequences to completed conduct." 119 S. Ct. at 2000 (citation omitted).

The same "common sense, functional judgment" is called for here, because immigrants charged with criminal offenses often face immigration consequences as severe as the penal consequences, and consequently, many of the decisions made in the course of their criminal proceedings are made to avoid those harsh immigration consequences. Pre-AEDPA, longtime lawful permanent residents who served less than five years for their offenses could seek a waiver of deportation. If they prevailed on their waiver applications – and more than half of them did – they could remain in the country because they had demonstrated strong family ties here, hardship to family members if they were deported, evidence of rehabilitation, a solid employment history, a record of community service, and other favorable factors. *Pottinger v. Reno*, No. 97 CV 3217 JBW, 1999 WL 569823, at *3 (E.D.N.Y. July 30, 1999). Thus, many immigrants had reason to accept plea bargains that would allow them to remain eligible for Section 1182(c) relief (and prosecutors and defense counsel structured pleas to achieve that result). The fact that these immigrants were subject to deportation before Section 440(d) was enacted misses the point. Deportation was not mandatory, as it would be if Section 440(d) applied retroactively.

Martin v. Hadix compels detailed consideration of which statutory provisions are relevant for determining congressional intent when explicit language is lacking, as well as a determination of the specific action that Congress intended to affect and whether the legislative change upset settled expectations. Under *Martin*, the courts must undertake more searching consideration of the practical consequences of a change in the law. Because the court of appeals did not conduct such an intensive review, but simply assumed that immigrants do not rely on the availability of Section 1182(c) relief, the opinion

should be vacated and remanded for reconsideration in light of *Martin v. Hadix*.

B. In the Alternative, Plenary Review is Warranted.

As laid out in *Landgraf*, and further explained in *Lindh*, the first step in any analysis of whether a statute should apply only prospectively is whether Congress, explicitly or by negative implication, directed that it should. In the five circuits that differ with the Seventh Circuit, the courts recognized that Congress had precisely described whether it wanted related provisions to apply retroactively and if so the degree of retroactivity it wanted. Accordingly, the other circuits all properly found that the lack of any such language in Section 440(d) was significant. *See Shah*, 1999 WL 493681, at *4; *Mayers*, 175 F.3d at 1302-03; *Sandoval*, 166 F.3d at 241; *Henderson*, 157 F.3d at 129-30; *Goncalves*, 144 F.3d at 128-31. The absence of any retroactive language in Section 440(d) reflected Congress' deliberate decision not to attach a "new legal consequence[ ]" or "new disability" to crimes that were not disqualifying before Section 440(d) was enacted. *Landgraf*, 511 U.S. at 269-70. The court of appeals in this case, in contrast, concluded that no inference could be drawn from Section 440(d)'s silence because it believed, incorrectly, that AEDPA contained some provisions that are expressly prospective, but others that are expressly retroactive, thereby negating any inference from the silence in Section 440(d). In fact, however, *all* of the provisions examined by the court of appeals are retroactive to some degree and therefore *do* permit a negative inference about Congress' intent in not specifying any retroactive effect for Section 440(d). The court of appeals erred, therefore, in holding Section 440(d) to be fully retroactive, particularly when just such a provision was

proposed in the Senate and not enacted. *See Goncalves*, 144 F.3d at 131-33.

IV. The Court of Appeals' Equal Protection Analysis Also Warrants Review.

The BIA held in *In re Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA May 14, 1997), that AEDPA 440(d) disqualifies certain "deportable" aliens from receiving Section 1182(c) relief, but permits "excludable" aliens who have committed the identical crimes to apply for such relief. The court of appeals erred in finding that the differing treatment of deportable and excludable aliens was rational and did not violate equal protection, when the only difference between the two groups is that the latter have traveled abroad (even for a day), and are seeking relief in an exclusion hearing.

The court of appeals' equal protection analysis conflicts with a long line of circuit authority first set forth in the Second Circuit's decision in *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976), which the INS long ago accepted as the appropriate national rule. *See In re Silva*, 16 I & N Dec. 26 (BIA 1976). The principle in *Francis* and its progeny is that Section 1182(c) relief may not be conditioned on the fact that an alien has taken a brief trip abroad.[16]

The court of appeals concluded, however, that Section 440(d) did not violate the *Francis* principle because Congress wanted to provide deportable immigrants with criminal convictions an incentive to leave the country voluntarily. App. 12a. That justification – not articulated by Congress – is irrational. In fact, when AEDPA went into effect, the INS itself did not believe AEDPA 440(d) was intended to draw a distinction between deportable

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[16] *But see DeSousa*, 1999 WL 643171; *Jurado-Gutierrez*, 1999 WL 637038; *Estrada-Torres v. U.S.*, 179 F.3d 776 (9th Cir. 1999).

and excludable aliens, and specifically argued to the BIA that to draw such a distinction would render the statute unconstitutional. *See Fuentes-Campos*, 1999 WL 269368, at *17. In any event, the court of appeals' hypothetical justification for the statute cannot save it. If the purpose of the statute was to induce resident aliens to leave the country, then the statute is wholly irrational as applied to aliens, like LaGuerre and Avelar-Cruz, who were already in deportation proceedings when AEDPA went into effect, and thus, could not have been influenced by the possibility that Section 1182(c) relief might be available in exclusion proceedings. Morever, most immigrants with criminal convictions are, by statutory directive, put into deportation proceedings while they are in prison or upon their release, *see* 8 U.S.C. 1252(a)(2) (1994), and cannot leave the country until their proceedings conclude.

CONCLUSION

Petitioners respectfully submit that the petition for writ of *certiorari* should be granted and the judgment vacated and remanded to the court of appeals, or alternatively, the case accepted for plenary review.

Respectfully submitted,

LISA J. PALUMBO
DIANA C. WHITE
LEGAL SERVICES CENTER FOR IMMIGRANTS
LEGAL ASSISTANCE FOUNDATION OF CHICAGO
111 West Jackson Blvd., 3rd Floor
Chicago, IL 60604
(312) 341-1070

LUCAS GUTTENTAG
Counsel of Record
LEE GELERNT
JAYASHRI SRIKANTIAH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1663 Mission Street
San Francisco, CA 94103
(415) 621-2493